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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 171

HURON MILLING COMPANY,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Huron Milling Company prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in this case on May 3, 1955.

Citation to Opinions Below

The opinions of the United States Court of Claims and of the dissenting Judges are reported in — C. Cls. — (No. 50451, decided May 3, 1955) and are printed in Appendix B hereof, *infra*, page 4a, together with the Findings of Fact.

Jurisdiction

The judgment of the United States Court of Claims was entered on May 3, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1255(1).

Question Presented

May the Commissioner of Internal Revenue by regulation defeat the specific Congressional intent to make a statute retroactive? The Act of September 5, 1950, Chapter 851, 64 Stat. 592 is made retroactive and applicable to all years ending after December 31, 1940, but the Commissioner of Internal Revenue, in promulgating his regulations thereunder, refused to permit elections to be made more than six months after the due dates of returns for the year 1941 and following years.

Statute Involved

The statutory provision involved is Section 22(d)(6) of the Internal Revenue Code of 1939 as amended by the Act of September 5, 1950, Chapter 851, 64 Stat. 592. This section both before and after amendment is printed in Appendix A, *infra*, pages 1a to 3a, together with the Regulation thereunder, the validity of which is here challenged.

Statement

The basis of the jurisdiction of the Court of first instance, the United States Court of Claims, was a complaint filed by the taxpayer pursuant to Title 28, U. S. C. Section 1491.

The case with respect to the question presented is as follows:

The petitioner contends that the Commissioner of Internal Revenue, in 1951 in limiting by regulation the time to make an election with respect to involuntary liquidations of inventory under Section 22(d)(6) of the 1939 Code to

six months from the due date of a return, disregarded the fact that the Act of September 5, 1950, Chapter 851, 64 Stat. 592, was retroactive to taxable years beginning after December 31, 1940.

The facts with respect to this question which are not in dispute and which are set forth in the Findings of Fact in Appendix B, page 9a, are as follows:

Petitioner was and is engaged in the manufacture of starches, adhesives and other wheat starch derivatives. Commencing with its fiscal year, June 30, 1940, petitioner, with the permission of the Commissioner of Internal Revenue, adopted the so-called "LIFO" (last in first out) method of keeping its inventories of flour. During the fiscal year ended June, 30, 1946, petitioner suffered an involuntary liquidation of flour inventory caused by War Food Order No. 144 as amended. That order limited the amount of wheat flour which would be made available to this petitioner or could be carried on hand by it.

The bookkeeping instructions for accounting for the LIFO inventory were issued to petitioner by one Thomas Forward, a Certified Public Accountant, who had previously installed the LIFO method of keeping inventories for petitioner in 1940. These instructions were erroneous. As a consequence, petitioner did not realize that an involuntary liquidation of inventory within the relief provisions of Section 22(d)(6) of the Internal Revenue Code of 1939 had occurred, until the fact was brought out in the course of examination by the Revenue Agent during January 1948 upon the examination of petitioner's return for the fiscal year ended June 30, 1946. The statute which was then in effect Section 22(d)(6) required that an election to claim an involuntary liquidation of inventory had to be made with the tax return for the year involved. Petitioner, being unaware of the tax effect of the involuntary liquidation because of the erroneous instructions,

had not made the election with its return, but only by filing a claim for refund after the Revenue Agent's examination of its 1946 return in 1948.

In 1950 Congress eliminated the requirement that the election be made at the time of the filing of the return and provided that the election be made at such time and in such manner and subject to such regulations as the Commissioner, with the approval of the Secretary, may prescribe. See Appendix A, page 2a. This Act was made retroactive to all taxable years beginning after December 31, 1940.

Reasons for Granting the Writ

1) The decision of the Court below involving the regulation-making power of the Treasury was sharply divided, three Judges upholding the Commissioner's regulation and two dissenting Judges declaring that the regulation as promulgated by the Commissioner of Internal Revenue nullified the intent of Congress in amending the relief provisions of Section 22(d)(6) of the Internal Revenue Code of 1939.

The question is one of paramount importance in the proper administration of the Internal Revenue laws of the United States. Congress has vested generally in the Secretary of the Treasury the power to make regulations in Section 7805 of the Internal Revenue Code of 1954 (Section 3791 of the 1939 Code). In addition, Congress has on innumerable occasions given to the Secretary of the Treasury or his delegate specific authority to promulgate regulations to carry into effect the statutory provisions, both in the Internal Revenue Code of 1939 and in the Internal Revenue Code of 1954. Attached hereto in Appendix C, page 22a, is a list of the numerous delegations in the 1954 Code. The question here is whether such

delegations may be used by the Secretary to effect a result inconsistent with the express language of the very statute under which the delegation is made.

Congress, in 1950, recognized the desirability of extending the time to make an election under Section 22(d)(6). There had existed a great deal of confusion as to the availability of the LIFO inventory method. It was not until after the decisions of the Tax Court of the United States in *Hutzler Brothers Co.*, 8 T. C. 14 (1947), and *Edgar A. Basse,* 10 T. C. 328 (1948) that the Commissioner recognized the right of taxpayers using the retail method of pricing inventories, to use LIFO. The 1950 Act, therefore, provided, with respect to the time within which to make an election with respect to involuntary liquidations of inventory under the LIFO method as follows:

> "Section 22(d)(6)(A) (relating to the involuntary liquidation and replacement of elective inventories) is hereby amended as follows:
>
> (1) By amending that portion thereof preceding clause (i) to read as follows:
>
> '(A) Adjustment of Net Income and Resulting Tax.—If, for any taxable year beginning after December 31, 1940, and prior to January 1, 1948, the closing inventory of a taxpayer inventorying goods under the method provided in this subsection reflects a decrease from the opening inventory of such goods for such year, and if the taxpayer elects, at such time and in such manner and subject to such regulations as the Commissioner with the approval of the Secretary may prescribe, to have the provisions of this paragraph apply, . . .'
>
> (b) The amendments made by this section shall be applicable with respect to taxable years beginning after December 31, 1940."

Congress thus showed its intention to extend the time to make an election under Section 22(d)(6) of the 1939 Code, retroactive to tax years ending after December 31, 1940. The Commissioner, under the authority delegated to him in the statute, in 1951 extended the time to make the election for all years after December 31, 1940 to six months from the date on which the return was due (T. D. 5841, 1951-1 C. B. 11 amending Regulations 111). As Judge Whitaker of the United States Court of Claims stated in his dissent:

> "Hence, under the regulation the time for making the election had passed before the Act giving the right had been enacted. Its retroactivity to the year 1941 was, therefore, nullified by the regulation. So, as to the years 1942, 1943, 1944, 1945, 1946, 1947 and 1948, and parts of 1949."

The Commissioner of Internal Revenue may not invoke his power to make regulations so as to defeat the statute itself. *Bingham Trust* v. *Commissioner,* 325 U. S. 365 (1945); *Maass* v. *Higgins,* 312 U. S. 443 (1941).

The importance of the regulation-making power of the Secretary of the Treasury in carrying out Congressional intent cannot be over-emphasized in view of the highly complicated and technical aspects of many of the provisions of the law. However, unless this broad rule-making power is circumscribed by checks and balances supplied by the Courts, the effect will be that the Secretary will be the legislator and not Congress.

Petitioner does not challenge the propriety of giving the Commissioner of Internal Revenue the power to make regulations *consistent* with the statute. *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1 (1915). However, where the Commissioner is given a power by Congress, he is not above the law in the manner of the exercise of that power.

Lucas v. *Ox Fibre Brush Co.*, 281 U. S. 115 (1930). He may not under his rule-making authority pervert a relief statute so as to give no relief.

2) The question here involved is a *continuing one.* Not only are a number of cases now pending in the Court of Claims and The Tax Court of the United States involving the election for the years here in question,[1] but the provisions of the Internal Revenue Code of 1954 once again give to the Secretary of the Treasury the same authority in the same language to promulgate regulations governing taxpayers' elections as previously contained in the Internal Revenue Code of 1939. Section 1321 of the Internal Revenue Code of 1954 is made retroactive to taxable years ending after June 30, 1950 just as Section 22(d)(6) had been made retroactive to years ending after December 31, 1940. Such section is printed in Appendix C at page 28a.

If the decision of the three Judges of the Court of Claims is permitted to stand, the Secretary or his delegate by regulation may also deny the retroactive effect of Section 1321, the successor to Section 22(d)(6), by limiting the right to make the election to six months from the due date of the return, even though such time had already elapsed.

Where retroactive tax legislation is enacted, the time limitation set by regulation ordinarily allows taxpayers a period of months from the date of the return or the effective date of the statute, whichever is *later.* See, *Ruud Manufacturing Co.*, 10 T. C. 14 (1948) aff'd 173 F. 2d 222 (C. A.—3, 1949) where the Tax Court had said at page 17:

> "If the Commissioner had set a limitation which was obviously impossible to meet, then his action

[1] Petitioner has been informed that among the cases now pending in the courts are: a) The United States Court of Claims: Joseph Horne Company, The Higbee Company, Halle Brothers Co., Hutzler Brothers Co., G. M. McKelvey Company, and, b) The Tax Court of the United States: Gimbel Brothers.

might be said to be unreasonable or arbitrary and the regulation invalid. But the date of June 15, 1943, set by the regulation involved herein, was over seven months after the law was approved and two and one-half months after the regulation was first promulgated. The period thus set was not obviously impossible to meet, unreasonably short, or arbitrary."

The question of the failure to give retroactivity, therefore, is one of continuing importance in the proper administration of the Internal Revenue laws of the United States, not only with respect to Section 22(d)(6) and its successor, Section 1321, but with respect to many other provisions of the law.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

JAY O. KRAMER,
Counsel for Petitioner.

Dated: June 20, 1955.

APPENDIX A

SEC. 22. GROSS INCOME

* * * *

((d) (6) (A) . . . As added by Sec. 119, 1942 Act . . .)

(6) Involuntary liquidation and replacement of inventory.—

(A) Adjustment of net income and resulting tax.—If, for any taxable year beginning after December 31, 1941, and prior to the termination of the present war as proclaimed by the President, the closing inventory of a taxpayer inventorying goods under the method provided in this subsection reflects a decrease from the opening inventory of such goods for such year, and if, at the time of the filing of the taxpayer's income tax return for such year, the taxpayer elects to have the provisions of this paragraph apply and so notifies the Commissioner, and if, at the time of such election, it is established to the satisfaction of the Commissioner, in accordance with such regulations as the Commissioner may prescribe with the approval of the Secretary, that such decrease is attributable to the involuntary liquidation of such inventory as defined in subparagraph (B), and if the closing inventory of a subsequent taxable year, ending not more than three years after the termination of the present war as proclaimed by the President, reflects a replacement, in whole or in part, of the goods so previously liquidated, the net income of the taxpayer otherwise determined for the year of such involuntary liquidation shall be adjusted as follows:

* * * *

Appendix A

SEC. 22. GROSS INCOME

• • • •

((d) (6) (A) . . . As amended by Sec. (1) (a), Pub. Law 756, 9-5-50 . . .)

(6) Involuntary liquidation and replacement of inventory.—

(A) Adjustment of net income and resulting tax.—If, for any taxable year beginning after December 31, 1940, and prior to January 1, 1948, the closing inventory of a taxpayer inventorying goods under the method provided in this subsection reflects a decrease from the opening inventory of such goods for such year, and if the taxpayer elects, at such time and in such manner and subject to such regulations as the Commissioner with the approval of the Secretary may prescribe, to have the provisions of this paragraph apply, and if it is established to the satisfaction of the Commissioner, in accordance with such regulations that such decrease is attributable to the involuntary liquidation of such inventory as defined in subparagraph (B), and if the closing inventory of a subsequent taxable year, ending prior to January 1, 1951, reflects a replacement, in whole or in part, of the goods so previously liquidated, the net income of the taxpayer otherwise determined for the year of such involuntary liquidation shall be adjusted as follows:

• • • • •

REGULATIONS 111

Sec. 29.22(d)-7 (As amended by T. D. 5841, May 22, 1951). Involuntary liquidation and replacement.

If prevailing war conditions beyond the control of the taxpayer should render it impossible during the

period of the war for a taxpayer using the elective inventory method to have on hand at the close of the taxable year a stock of merchandise in kind and description like that included in the opening inventory for the year, or in a quantity equal to that of the opening inventory, the resulting inventory decrease for the year will be regarded, at the election of the taxpayer, as reflecting an involuntary liquidation subject to replacement. If the taxpayer notifies the Commissioner *at any time not later than 6 months after* the time of filing his income tax return for the year of the liquidation (or, with respect to liquidations occurring in a taxable year beginning in 1941, at any time prior to August 6, 1944) that he intends to effect a replacement of the liquidated stock, in whole or in part, and that he desires to have applied in his case the involuntary liquidation and replacement provisions of section 22(d)(6), and if he establishes to the satisfaction of the Commissioner the involuntary character of the liquidation to which his stock has been subjected, effect shall be given, when replacement has been made, to an adjustment of net income for the year of liquidation to the extent of the difference between the replacement costs incurred and the original inventory cost of the base stock inventory liquidated. (*For extensions of time, see subpart H, as added by Treasury Decision 5391, approved July 14, 1944, and amended by Treasury Decision 5400, approved August 22, 1944.*) . . .

• • • •

Footnote 29.22(d)-7 (T. D. 5841).——

Matter in *italics* added to Sec. 29.22(d)-7 (as amended by T. D. 5364, Apr. 20, 1944 and T. D. 5645, July 20, 1948) by T. D. 5841, May 22, 1951. . . .

APPENDIX B

IN THE
UNITED STATES COURT OF CLAIMS

No. 50451

(Decided May 3, 1955)

HURON MILLING COMPANY

v.

THE UNITED STATES

MR. JAY O. KRAMER for plaintiff.

MR. H. S. FESSENDEN, with whom was MR. ASSISTANT ATTORNEY GENERAL H. BRIAN HOLLAND, for defendant. MESSRS. ANDREW D. SHARPE and ELLIS N. SLACK were on the brief.

OPINION

MADDEN, *Judge,* delivered the opinion of the court:

The plaintiff sues to recover income and excess profits taxes in the amount of $112,638.90, collected from it for the fiscal year which ended June 30, 1946. It says that it should have been allowed a reduction in its income for that year because, during that year, it was compelled, by an order of the War Food Administration, to reduce its inventory of flour on hand, and was not allowed to rebuild its inventory until after that year had ended. When it did replenish its stock of flour, the flour cost it much more than the flour which was in its inventory at the beginning of the 1946 fiscal year had cost it.

Appendix B

The plaintiff bases its claim upon section 22 (d) (6) (A) of the Internal Revenue Code (Title 26 U. S. C.). That section provides that if, for any taxable year beginning after December 31, 1940, and prior to January 1, 1948, a taxpayer which has been using the "last in first out" or LIFO method of computing its inventory, has a closing inventory smaller than its opening one, because of an involuntary reduction in its stock of goods, it may elect, at such time and in such manner as the Commissioner of Internal Revenue may prescribe, to abandon the LIFO method. If it does so elect, and if it builds up its inventory in a subsequent taxable year, it may have its taxable income for the taxable year in which its inventory was depleted reduced by the amount by which the cost of the replacement exceeded the cost of the goods depleted, or increased by any reduction in such cost.

As section 22 (d) (6) was at the time plaintiff filed its 1946 return, in September 1946, it required the taxpayer to make the election referred to above at the time the return for the year in which the inventory was depleted was filed. If he did so elect, and if prices in the subsequent year in which he replenished his inventory were lower, his tax for the year would be increased. The plaintiff, in fact, replenished its inventory during the months of July, August, and September 1946, before it filed its return for the fiscal year ending June 30, 1946, during which months prices were higher, and the price trend was upward, hence it would seem that it would have known that it would be to its advantage to make the election. Apparently, its tax advisor was not aware of the provisions of section 22 (d) (6) (A). At any rate the plaintiff did not make the election when it filed its return. On June 1, 1948, the plaintiff filed its claim for refund on the ground of section 22 (d) (6) (A). The Commissioner of Internal Revenue rejected the claim on December 8, 1949.

Appendix B

By the Act of September 5, 1950, c. 851, 64 Stat. 592, section 22 (d) (6) was amended by eliminating the requirement of election at the time of filing the return and saying that the election should be

> at such time and in such manner and subject to such regulations as the Commissioner with the approval of the Secretary may prescribe, * * *.

The Commissioner by regulation, sec. 29.22 (d)–7 [as amended by T. D. 5841, 1951—1 Cum. Bull. 11], provided that the election had to be made within six months from the date of the filing of the return. The 1950 amendment, as implemented by the regulation, of course gave no relief to the plaintiff. The six months' period had expired years before the statute and the regulation were promulgated.

The plaintiff urges that the regulation is invalid because it nullifies the intention of the statute. The plaintiff contends, in effect, that the regulation, in order to carry out the intent of the statute, should have allowed a taxpayer at least the time, after the filing of the return, that elapsed before the return was examined and investigated by the revenue agent. The plaintiff quotes language from the Ways and Means Committee Report on HR 3278, which embodied the 1950 amendment, giving, as an example of hardship, a case where the revenue agent had segregated an inventory which the taxpayer had regarded as a single inventory into two separate inventories, and found that one of them had been involuntarily liquidated, although, taking the two together, the inventory had not been depleted. The Committee said:

> Since the amendment is retroactive to taxable years beginning after December 31, 1940, the Commissioner of Internal Revenue can provide relief in any case which appears to involve hardship.

Appendix B

It may well be that the Commissioner's regulations should have been so drawn as to cover a hardship case such as that given by the Committee as an example. But that would not mean that the regulation was void as to the plaintiff and all other taxpayers for the whole 1940-1948 period who failed to make an election only because they were not aware of the statutory privilege. The regulation did extend the privilege to those who, either unaware of the statute or in doubt as to whether election would be to their advantage, learned of the statute or made up their minds as to its advantages within six months after filing their returns. It was not, therefore, a futile and useless regulation.

The plaintiff urges, not very vigorously, that the return which it did file constituted an informal election pursuant to section 22 (d) (6) (A). One skilled in tax law might have concluded from looking at the return that the plaintiff was unaware of section 22(d) (6) (A). That is not an informal election pursuant to that section.

The plaintiff urges that, because it permitted its tax return to be prepared by an apparently competent tax advisor, it should have the involuntary liquidation privilege, although it did not elect to take it within the time stipulated in the regulation. The plaintiff cites cases, the leading one being *Hatfried, Inc.* v. *Commissioner* (C. A. 3) 162 F. 2d 628. That was a case where the Commissioner imposed the statutory 25 percent penalty for failing to file a personal holding company return, although the taxpayer had acted on the advice of a competent accountant. The statute provided for the imposition of the penalty "unless it is shown that such failure is due to reasonable cause and not to wilful neglect." The court held that the penalty should not have been imposed.

In the instant case, the plaintiff was not subjected to a penalty. It was given the privilege of an election, which, if it had exercised it at the time of filing its return, as the

statute then required, or if, as the regulation was later written, it had exercised it within six months after the filing of the return, would have given it a tax advantage. We think the refusal of the Commissioner to waive the requirements of the regulation is not at all the equivalent of the imposition of a penalty. If the plaintiff was entitled to the privilege on this showing, we think every such taxpayer from the year 1940 to the time when the tax statute expired in 1948 could have claimed it, after the 1950 amendment was enacted.

Our conclusion is that the plaintiff, because it did not make its election in compliance with the statute in force at the time it filed its return nor in compliance with the 1950 amendment and the regulation issued under it, is not entitled to recover. In view of this conclusion, it is not necessary to decide the extremely intricate and troublesome question raised by the Government of whether the plaintiff's resort to the Tax Court deprived it of the right to sue in this court.

The plaintiff's petition will be dismissed.

It is so ordered.

LARAMORE, *Judge;* and JONES, *Chief Judge,* concur.

WHITAKER, *Judge,* dissenting:

It seems to me that the regulation under the 1950 Act requiring the making of an election within six months after the return was filed nullifies that provision of the Act which makes it retroactive to taxable years beginning after December 31, 1940. A return for a taxable year beginning January 1, 1941, had to be filed by March or April 1942. If the election had to be made six months thereafter, it would have been necessary to make it by September or October 1942; but the Act of 1950 extending the time for making the election was not passed until eight years later. Hence, under the regulation the time for

making the election had passed before the Act giving the right had been enacted. Its retroactivity to the year 1941 was, therefore, nullified by the regulation. So, as to the years 1942, 1943, 1944, 1945, 1946, 1947 and 1948, and parts of 1949.

The taxpayer was entitled to some period of time after the passage of the Act of 1950 to take advantage of the privilege therein granted. It claimed the privilege in 1948, when it filed its claim for refund.

I think plaintiff is entitled to recover.

LITTLETON, *Judge,* concurs in this dissent.

FINDINGS OF FACT

The court, having considered the evidence, the report of Commissioner George H. Foster, and the briefs and argument of counsel, makes findings of fact as follows:

1. The plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Michigan with its principal offices at Harbor Beach, Michigan. It is engaged in the manufacture of starches, adhesives, monosodium glutamate, and other wheat starch derivatives.

2. Commencing with its fiscal year ended June 30, 1940, plaintiff with the permission of the Commissioner of Internal Revenue adopted the so-called "LIFO" method of keeping its inventories of flour pursuant to the provisions of section 22 (d) of the Internal Revenue Code. Thereafter, and at all times pertinent hereto, the plaintiff continued to keep its inventories of flour under such method.

3. Plaintiff, during the period here involved, kept its books of account on the accrual basis and reported its income for tax purposes on the fiscal year basis com-

mencing July 1 of each year and ending June 30 of the following year.

4. During the fiscal year beginning July 1, 1945, and ending June 30, 1946, plaintiff's inventories of flour were greatly reduced because of the restrictions provided by War Food Order No. 144, as amended. Under that order, domestic deliveries of wheat flour for the year 1946 were reduced to not over 75 percent of the quantity distributed by millers in plaintiff's category in the corresponding months of 1945. The said regulation also prohibited the plaintiff from carrying more than twenty-one days' supply of flour on hand.

5. Plaintiff's inventories of flour as of July 1, 1945, and June 30, 1946, together with the value thereof reported in its tax returns for its fiscal year 1946 were as follows:

	On hand July 1, 1945	On hand June 30, 1946
Number of pounds reported but unchanged by Commissioner of Internal Revenue	9,851,630 lbs.	1,569,745 lbs.
Valuations reported in returns	$143,104.35	$22,465.56

6. During the months of July, August, and September 1946, the plaintiff purchased the quantities of flour shown below for inventory replacement:

	Quantity, lbs.
July 1946	384,020
August 1946	2,471,840
September 1946	4,618,855
Total	7,474,715

7. On September 11, 1946, plaintiff filed its corporation income and declared value excess profits tax return and its excess profits tax return for its fiscal year ended June

30, 1946, reporting an aggregate tax liability of $691,798.45, which was duly paid. Subsequently, the Commissioner of Internal Revenue made certain adjustments in plaintiff's reported income and excess profits tax liability, which adjustments are not involved in this proceeding. The plaintiff did not file with its returns for its fiscal year 1946 any statement showing its election to invoke the involuntary liquidation relief provisions of section 22 (d) (6) of the Internal Revenue Code.

8. On June 14, 1950, the Commissioner of Internal Revenue duly issued a ninety-day statutory deficiency notice covering several years including plaintiff's fiscal year 1946. Plaintiff was advised in the deficiency notice that the issues set forth in its claims for refund for the fiscal year ended June 30, 1946, which were thereby denied, should be made a part of any petition by the plaintiff filed with the Tax Court of the United States. No deficiency was asserted in the deficiency notice for the fiscal year ending June 30, 1946.

The computation of taxable income for the fiscal year ended June 30, 1946, set forth in the statutory notice of deficiency, discloses a further deduction of $108,724.01 for cost of sales. This deduction resulted from correction of plaintiff's LIFO method of valuing inventories for the fiscal year 1946. This and the other adjustments to taxable income for the fiscal year 1946 were agreed to by plaintiff in an agreement executed by plaintiff on August 11, 1948.

9. On June 30, 1950, the plaintiff filed a petition with the Tax Court of the United States appealing from the determination of the Commissioner as set forth in his ninety-day letter.

In its petition to the Tax Court, plaintiff claimed that the Commissioner of Internal Revenue erred in failing

to allow an additional deduction from net income for the fiscal year 1946 for interest paid during such fiscal year and also erred in failing to allow adjustments under section 711 (b) (1) (J) (ii) and section 721 (a) (2) (C) of the Internal Revenue Code. Plaintiff also claimed the Commissioner failed to compute correctly its inventories under section 22 (d) of the Internal Revenue Code for the fiscal years ended June 30, 1940 to June 30, 1946, inclusive. No claim was made in the petition, of an election to invoke the involuntary liquidation relief provisions of section 22 (d) (6) of the Internal Revenue Code for the fiscal year 1946.

That petition with respect to plaintiff's fiscal year 1946 specifically presented issues arising under sections 23 (b), 711 and 721 of the Internal Revenue Code.

On January 9, 1951, plaintiff filed with the Tax Court a motion to strike from its petition the issue concerning the claim of an additional deduction from net income for the fiscal year 1946 for interest paid during such fiscal year and, for a reason therefor, stated it was no longer contesting the issue. The Tax Court granted plaintiff's motion to strike on the same date it was filed.

10. On January 9, 1951, the plaintiff and the Commissioner of Internal Revenue filed with the Tax Court a stipulation agreeing to certain deficiencies and overassessments for the years involved in the proceeding before that court. With respect to plaintiff's fiscal year 1946, it was stipulated that there was an overpayment of excess profits taxes in the amount of $10,277.76. The stipulation also said:

> That for the fiscal year ended June 30, 1946 there are no standard issues before this Court. The overpayment of excess profits tax arises solely from the application of Sections 711 and 721 of the Internal Revenue Code. Petitioner does not hereby waive

whatever rights it may have with respect to any standard issues for the fiscal year ended June 30, 1946.

11. On January 15, 1951, the Tax Court issued its decision on the stipulation of the parties and, with respect to plaintiff's fiscal year 1946, it ordered and decided:

> That there is an overpayment in excess profits tax for the fiscal year ended June 30, 1946 in the amount of $10,277.76, which amount was paid within two years before the filing of the claim for refund.

A deficiency of $4,808.30 in the plaintiff's income tax was also determined for its fiscal year 1946, and after the plaintiff had duly filed a consent thereto on Form 870-TS on January 2, 1951, the deficiency was paid by credit on February 28, 1951.

12. At the time plaintiff adopted the LIFO method of keeping inventories in 1939, it employed as its tax advisor, one Thomas Forward, who prepared its tax returns. Thomas Forward was a certified public accountant engaged in the practice of public accounting with many years of experience in handling tax matters for the plaintiff and for others.

At the instructions of Mr. Forward, plaintiff priced any increases in its inventory in each taxable year over the preceding year in the following manner. If the inventory of the taxable year exceeded the inventory of June 30, 1939, the excess was priced by using the price paid in each succeeding month following June 30, 1939, for the acquisitions in those months equal to the increase in the inventory in the current year over the prior year. The increases in the inventory from one year to the next were designated as layers.

Under the instructions of Mr. Forward, if there was a

decline in the amount of inventory of one taxable year below that of the preceding year, the last layer of the inventory was eliminated. However, if in the following year there was an increase in the closing inventory, the increase was priced at the price of the layer previously eliminated rather than at the price of the first acquisitions in the year just ended.

Plaintiff thought that the instructions of Mr. Forward were proper until the revenue agent's examination of the return for the fiscal year ended June 30, 1946, which was commenced in January 1948.

13. The process of examining corporate returns is a complicated and time consuming activity, including the following steps: the assignment of a serial number by the collector, mathematical verification, transfer of the return to Washington, examination in Washington, transfer of the return to the agent's office, survey of the return in the agent's office, assignment to the group chief, assignment by the group chief to the revenue agent, examination by the revenue agent prior to notification of the taxpayer, notification of the taxpayer, and field audit.

Taxpayer's return for the fiscal year ended June 30, 1946, was not examined within six months of its due date on September 15, 1946.

14. On April 20, 1946, The New Century Company, 3940 South Union Avenue, Chicago, Illinois, addressed a letter to G. G. Shipley, secretary of the plaintiff company, reading as follows:

> I told you over the phone this morning from memory that we had 10,500 cwts. in store at Sykes Terminal Warehouse. This is incorrect. The exact quantity is 13,500 Cwts. I had in mind 10,500–140# jutes or about the equivalent of 13,500 cwts. The figure I gave you as 11,118 cwts. in store at our warehouse is correct.

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Shortly after I talked to you, our Journal of Commerce was delivered, and in reading Item 3 of the amended War Food Order 144, I conclude that we are not included in this restriction as the order reads, "limited Millers and Feed Manufacturers, etc." It says nothing about Jobbers or Merchandisers.

It appears as though you will have to keep your inventory down to 21 days supply effective May 1st, but we can keep as much flour in store as we can get space for.

As explained, we are shipping two cars today and have only four more in transit, and from the notifications we have had from several mills, we do not believe we will have too much flour to worry about for awhile and can arrange to handle any shipments we do get. In other words, we do not want to stop the mills from shipping if we possibly can avoid it.

15. On April 24, 1946, The Consolidated Flour Mills Company, Wichita, Kansas, addressed a letter to the plaintiff, reading as follows:

The government really pulled a fast one in making the 75% limitation order retroactive to April 1. This forced us to shut down our mills since we had already ground 75% of our April '45 production. Wired you yesterday so you would know our situation.

We intend to be running again by the middle of next week. Will then get your shipments out as rapidly as possible.

Sincerely regret this situation which, of course, is due to another government attempt to fulfill export promises. They have been trying everything, as you know.

Kindest regards.

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16. On June 6, 1946, The New Century Company addressed a further letter to plaintiff's secretary, reading as follows:

> We thought you might be interested in knowing how the flour supply situation looks from here.
>
> As you know, our Mr. Shields just recently returned from a trip through the Southwest. He had in mind two purposes; one was to secure whatever old crop flour he could and the other was to book as much new crop flour as possible. He was able to buy only two cars of old crop flour, and while the millers were rather optimistic as to what they expected to do on the new crop, he was unable to book a single car.
>
> Just what we are going to be able to buy is very uncertain. We hope to be able to get a few cars toward the end of this month, and then feel rather optimistic about the prospects of getting a fairly good supply toward the middle of July. However, it all depends upon how the wheat moves, and none of the millers seemed certain enough about getting a supply that they wanted to book any flour.
>
> We know you need to plan your operations as far in the future as possible, and we wish we could give you some definite information, but up to the present time, it is impossible. It does seem to us that with the banner crop which is being harvested that there should be lots of wheat and flour available very shortly, and you may be sure we will do our best to get you all possible.

17. On September 29, 1947, the plaintiff addressed a letter to Mr. T. S. Forward of Forward & Love, 409 Griswold Street, Detroit, Michigan, reading as follows:

> You will recall that due to conditions beyond our con-

trol we lost our Plant base inventory of 6/30/39 in FY 1946. At June 30th, 1939 we had on hand an inventory that was sufficient to run our regular production for 1¾ months, or 4,335,380 lbs. The first six months of FY 1940 we washed 15,000,000 lbs. flour, an average of 2,500,000 per month. At June 30th, 1945 we had an inventory of 9,852,430 lbs. which was 1¾ months supply, the same as our 6/30/39 inventory was.

We only operated 13 days in May of FY 1946 due to our inability to get flour and by June 30th we had only 1,569,745 lbs. of flour on hand. If I remember correctly we decided to run in June as against July as we never dreamed the inventory basis would be changed as it was this last spring. As it happened we could not acquire enough flour on hand nor buy future delivery in quantities sufficient to run the plant until August 1946. Late in August 1946 we did start up and have run continuously since and at June 30, 1947 had built our flour inventory up to 9,044,000 lbs. which at the last three months rate would be 1.6 months supply.

The above is a rough story but if there is any merit in the idea we can go into any further facts that are necessary. I might mention though, that on flour alone the difference at June 30, 1947 between the way we have been pricing the elective and the way we had to do it finally amounted to a loss to us of 231,600.00 for FT [sic] 1947. And if our inventory liquidation of flour late in FY 1946 had not happened we would have had our 1939 basis intact on which to price the June 30, 1947 flour inventory which would have given us the 231,600.00 loss, which in effect was partially offset by a 97,000.00 gain we had to take June 30, 1945 as due to flour shortages at that time, we had

lowered our flour inventory quite a little during the year.

Now the question. The Government has been allowing companies to pick up their basic elective inventories at the time they change back from war production to domestic production and it seems to us we have seen of cases where this was also allowed in cases of involuntary liquidation of inventories which happened in our case. Is it possible that we have a good enough case to go to the Treasury Department with in the case of our Raw Material, Flour? It would make a tremendous difference to us if we could.

To protect the 500,000. difference in our elective and actual cost inventory at the present time we have got to watch our sales and inventory the early spring and summer every year in order to maintain at least the equivalent of the 6/30/46 inventory which is now our only protection from falling prices, when they come.

18. On October 8, 1947, the plaintiff wrote a further letter to Mr. T. S. Forward, readings as follows:

Per our phone conversation of yesterday afternoon, I understand you wish to know just why we were unable to maintain our flour inventory at a normal quantity at 6/30/46.

I believe the explanation lies in the War Food Order 144 amended. This measure set up restrictions as a famine relief measure. It cut domestic deliveries to not over 75% of the quantity of flour distributed by millers in the corresponding month of 1945. It also prohibited us from carrying over 21 days supply of flour on hand, per the New Centruy [sic] Co. letter to us of April 20, copy of which is enclosed. We do not appear to have a complete copy of the text of

these amendments 6-7 to the War Food Order #144. According to the special bulletin of the Southwestern Miller of 4/20/46, the flour limitations on deliveries were retroactive to April 1, 1946.

If there is any more information we can get you, please advise.

19. On April 27, 1948, the plaintiff addressed a further letter to Forward & Love, reading as follows:

With reference to our 'phone conversation of this morning we are listing below the detail of the inventories on flour for the fiscal years 6/30/45–6/30/46 & 6/30/47. These figures are all on the new valuations as figured by us in March and are apparently accepted by Mr. Zinzo, the Revenue Agent, as to method of figuring.

Flour Inventories:	#	per C	$
Inventory June 30, 1945..	9,851,630	@2.16325	213,115.91
Made up as follows:			
Base 6/30/39	4,352,849	1.4344	62,436.25
Base July 1939 Purchase	389,651	1.4352	5,592.27
Base July 1940 Purchase	186,088	1.7575	3,270.50
Base July 1941 Purchase	355,164	2.0611	7,320.29
Base July 1943 Purchase	4,567,878	2.9444	134,496.60
Total Inventory of June 30, 1945	9,851,630	2.16325	213,115.91
Total Inventory of June 30, 1946	1,569,745	1.4344	22,516.42
Total Inventory of June 30, 1947	9,044,460	@4.021	363,702.88
Breakdown of values used:			
Base 6/30/39	1,569,745	@1.4344	22,516.42
Base July 1946 Purchase	384,020	@3.9102	15,015.89
Base August 1946 Purchase	2,471,840	@4.625	114,317.55
Base Sept. 1946 Purchase	4,618,855	@4.5867	211,853.02
	9,044,460	4.021	363,702.88

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Refiguring the 6/30/47 Inventory under the method used for allowance of claim in involuntary liquidation of inventories, we would have the following:

INVENTORY 6/30/47

Valuation of 9,044,460 because we did not apply for relief under involuntary liquidation provision.

Base 6/30/39	1,569,745	@1.4344	22,516.42
Base July 1946 Purchase..	384,020	@3.9102	15,015.89
Base Aug. 1946 Purchase..	2,471,840	@4.625	114,317.55
Base Sept. 1946 Purchase..	4,618,855	@4.5867	211,853.02
	9,044,460	4.021	363,702.88

INVENTORY 6/30/47

Valuation under involuntary liquidations using values in 6/30/45 Inv.

Base 6/30/39	4,352,849	@1.4344	62,436.25
Base July '39 Purchase...	389,651	@1.4352	5,592.27
Base July '40 Purchase...	186,088	@1.7575	3,270.50
Base July '41 Purchase...	355,164	@2.0611	7,320.29
Base July '43 Purchase...	3,760,708	@2.9444	110,730.29
	9,044,460	2.09354	189,349.60

DIFFERENCE: INVOLUNTARY CONVERSION LOSS FOR F. Y. 1946:

Inv. 6/30/47 (as refigured 3/48)	9,044,460	@4.021	363,702.88
Inv. 6/30/47 (based on recovery of 1945 inv.)....	9,044,460	@2.09354	189,349.60
Loss due to involuntary Conversion of Inventory of 6/30/45—partially regained in 1947			174,353.28

In support of the above claim, we will have to show the involuntary conversion on flour was of a nature to make the loss an allowable deduction and also we believe we should have the proper application submitted with the amended 1947 return you are going to file, in order to protect us for the 47 year. However, at present it does not look like we could blame

any liquidation last year or this year on any cause acceptable under the Revenue Code.

I believe our correspondence of last September and October covers the reasons for our loss of the flour base inventory.

20. On June 1, 1948, plaintiff filed a claim for refund for its fiscal year ended June 30, 1946, in the amount of $112,638.90. That claim asserted as grounds therefor the issues raised in the present proceeding and therein for the first time the plaintiff claimed the benefit of Code section 22 (d) (6) on the ground that its flour inventories for its fiscal year 1946 had been subjected to involuntary liquidation. By statutory notice dated December 8, 1949, the Commissioner of Internal Revenue rejected plaintiff's claim for refund.

Conclusion of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is not entitled to recover, and its petition is dismissed.

APPENDIX C

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*Application presently in question.

Appendix C

INTERNAL REVENUE CODE OF 1954

"SEC. 1321. INVOLUNTARY LIQUIDATION OF LIFO INVENTORIES.

(a) Adjustment of Taxable Income and Resulting Tax.—If, for any taxable year ending after June 30, 1950, and before January 1, 1955, the closing inventory of a taxpayer inventorying goods under the method provided in section 22 (d) of the Internal Revenue Code of 1939 reflects a decrease from the opening inventory of such goods for such year, and if the taxpayer elects, at such time and in such manner and subject to such regulations as the Secretary or his delegate may prescribe, to have this section apply, * * *"

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CITATIONS

Cases:

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Elbert v. *Johnson*, 164 F. 2d 421 — 12

Fendrich, H., Inc. v. *Commissioner*, 192 F. 2d 916 — 12

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Packer Pub. Co. v. *Commissioner*, 211 F. 2d 612 — 12

Pizitz, Louis, Dry Goods Co. v. *Deal*, 208 F. 2d 724, certiorari denied, 347 U. S. 952 — 8

Ross v. *United States*, 75 F. Supp. 725 — 12

Statute:

Internal Revenue Code of 1939:

Sec. 22 (26 U. S. C. 1952 ed., Sec. 22) — 2, 5, 6, 14

Sec. 322 (26 U. S. C. 1952 ed., Sec. 322) — 2, 12, 16

Sec. 711 (26 U. S. C. 1952 ed., Sec. 711) — 2, 11, 12, 17

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Sec. 1142 (26 U. S. C. 1952 ed., Sec. 1142) — 2, 20

QUESTION PRESENTED

Whether the taxpayer is entitled to invoke the relief provisions of Section 22 (d) (6) of the Internal Revenue Code of 1939, relating to the involuntary liquidation of "last-in, first-out" (LIFO) inventories where it failed to file a timely application therefor with the Commissioner of Internal Revenue, as required by Section 29.22 (d)–7 of Treasury Regulations 111.[2]

STATUTE AND REGULATIONS INVOLVED

Sections 22 (c) and (d), 322 (c), 711 (a), 721 (a), 729 (a), 732 (a) and 1142 of the Internal Revenue Code of 1939, and Sections 29.22 (d)–1, 29.22 (d)–5 and 29.22 (d)–7 and Subpart H of Treasury Regulations 111, are set forth in the Appendix, *infra*, pp. 14–24.

STATEMENT

The facts as found by the Court of Claims (R. 9a–21a), may be summarized as follows:

The taxpayer is a Michigan corporation engaged in the manufacture of starches, adhesives, monosodium glutamate, and other wheat starch derivatives. (R. 9a.)

Beginning with the fiscal year ended June 30, 1940, the taxpayer, with the permission of the Commissioner of Internal Revenue, adopted the

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[2] Another question presented, but not decided, in the court below is whether the taxpayer, having previously resorted to the Tax Court, is precluded by statute from maintaining this suit.

"last-in, first-out" or "LIFO" method of keeping its inventories of flour pursuant to the provisions of Section 22 (d) of the Internal Revenue Code of 1939. Thereafter, and at all times here pertinent, the taxpayer continued to use the "LIFO" method of keeping its inventories of flour. (R. 9a.)

During the fiscal year ended June 30, 1946, the taxpayer was compelled by an order of the War Food Administration to reduce its inventories of flour on hand and was not allowed to replenish such inventory until after that year had ended. The taxpayer's inventory of flour on hand was thus reduced by 8,281,885 pounds during the fiscal year ended June 30, 1946. During the months of July, August and September, 1946, the taxpayer purchased 7,474,715 pounds of flour for inventory replacement. (R. 10a.)

On September 11, 1946, the taxpayer filed its corporate income and declared value excess profits tax return and its excess profits tax return for the fiscal year ended June 30, 1946. The taxpayer did not file with these returns any statement showing its election to invoke the involuntary liquidation relief provisions of Section 22 (d) (6) of the Internal Revenue Code of 1939. (R. 10a–11a.)

On June 14, 1950, the Commissioner duly issued notice of (1) his disallowance of the taxpayer's claims for refund for the fiscal year ended June 30, 1946, in which the taxpayer had asserted that it should be allowed adjustments under Sections

the time the taxpayer filed his income tax return for the year of liquidation he elected[6] to have those provisions applied. In 1950, Congress amended Section 22 (d) (6) to provide that the taxpayer's election with respect to application of the involuntary liquidation relief provisions might be made "at such time and in such manner and subject to such regulations as the Commissioner with the approval of the Secretary may prescribe." In recommending this amendment the committee reports pointed out that under certain circumstances a taxpayer when filing his income tax return for the year of liquidation might not be in a position to know that an involuntary liquidation had occurred which would enable him to take advantage of the involuntary liquidation relief provisions; accordingly these reports concluded: "Since the amendment is retroactive to taxable years beginning after December 31, 1940, the Commissioner of Internal Revenue can provide relief in any case which appears to involve hardship." H. Rep. No. 2756, 81st Cong., 2d Sess., p. 2; S. Rep. No. 2366, 81st Cong., 2d Sess., p. 2 (2 U. S. Code Congressional Service (1950), pp. 3576–3577).

On May 22, 1951, T. D. 5841, 1951–1 Cum. Bull. 11, was issued to amend Section 19.22 (d)–7 of

[6] If the replacement cost should be less than the cost of the original, depleted inventory, it would not be to the taxpayer's advantage to elect to have the involuntary liquidation relief provisions applied.

Treasury Regulations 103 and Section 29.22 (d)–7 of Treasury Regulations 111 (Appendix, *infra*, pp. 21–23), to conform with the 1950 amendment of the statute. As so amended, these Regulations generally provided that notification of the taxpayer's election to have the involuntary liquidation relief provisions applied might be made not later than 6 months after the time for filing his income tax return for the year of liquidation, and specifically called attention to the provisions of Subpart H of the Regulations* with respect to extensions of time for making elections. In dealing with the manner in which a taxpayer should make an election to have the involuntary liquidation relief provisions applied, the amended Regulations also provided that his notification of his election should include the following—

> * * * in the case of an election made pursuant to an extension of time sought under subpart H more than 6 months after the filing of the return for the year of liquidation, the circumstances relied upon as

* Prior to the 1950 amendment of the statute eliminating the requirement that the taxpayer make his election at the time he filed his income tax return for the year of liquidation, the extension provisions of Subpart H of Treasury Regulations 111, Appendix, *infra*, pp. 23–24, (like Subpart H of Treasury Regulations 103) did not apply to this type of case because they are expressly made inapplicable to elections required to be made in or with the taxpayer's original income tax return.

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justifying the election at such time, together with a disclosure of the extent, if any, to which replacements have already been made.

Apparently assuming that by its 1950 amendment Congress intended to make the involuntary liquidation relief provisions of Section 22 (d) (6) of the Internal Revenue Code of 1939 retroactively available to *all* taxpayers using the "LIFO" method of keeping inventories, the taxpayer in the instant case contends (Pet. 2, 4–8) (1) that the decision of the Court of Claims is incorrect, and (2) that this case presents an important, general question which should be decided by this Court, namely, whether the Commissioner can by regulation defeat the specific purpose of Congress to make a statute retroactive. On the contrary, we submit, review by this Court is not warranted because (1) the Court of Claims, in accordance with the decision of the Court of Appeals for the Fifth Circuit in *Louis Pizitz Dry Goods Co.* v. *Deal,* 208 F. 2d 724, certiorari denied, 347 U. S. 952, correctly decided that the taxpayer in this case is not within the class of taxpayers to which Congress intended to make the involuntary liquidation relief provisions retroactively available, (2) the Regulations properly interpret the statute and no important, general question of rule-making power is involved, and (3) the taxpayer, having previously resorted to

the Tax Court, is precluded by statute from maintaining this suit.

1. The court below, in accordance with the *Pizitz* decision, correctly held that by its 1950 amendment Congress did not intend to make the involuntary liquidation relief provisions of Section 22 (d) (6) of the Internal Revenue Code of 1939 retroactively available to *all* taxpayers using the "LIFO" method of keeping inventories. Certainly the meaning of the statutory provisions for election "at such time and in such manner and subject to such regulations as the Commissioner with the approval of the Secretary may prescribe" does not require the Commissioner to issue Regulations either validating any prior untimely election, or permitting any subsequent election, regardless of the taxpayer's situation. And, as previously indicated, the legislative history of the 1950 amendment clearly shows that the intention of Congress was merely to authorize the Commissioner to issue Regulations providing for relief in hardship cases. It is also apparent that the taxpayer's situation was not such as to bring it within the contemplated class of hardship cases. Thus, as the Court of Claims pointed out (R. 5a), when the taxpayer in September of 1946 filed its income tax return for its fiscal year ended June 30, 1946, it was in a position to know not only that an involuntary liquidation had caused a decrease in its inventory of flour on hand but also

that the replacement cost was considerably higher than the cost of the original, depleted inventory.[7] It was not, however, until June 1, 1948, over twenty months later, that the taxpayer first attempted to make the election then required to have been made at the time it filed its return. Under these circumstances, the Court of Claims correctly concluded (R. 8a) that under the statutory provisions then in effect the taxpayer's election was not timely when made and that the Commissioner had not improperly penalized the taxpayer in refusing to waive the requirements of the Regulations construing the 1950 amendment of the statute.

2. Although the court below concluded that the taxpayer was not in a position to challenge the validity of the Regulations interpreting the 1950 amendment of Section 22 (d) (6) of the Internal Revenue Code of 1939 because the taxpayer's situation did not bring it within the class of hardship cases to which the 1950 amendment was intended to apply, it was apparently assumed in the court below (R. 7a) that those Regulations would not cover a type of hardship case contemplated by Congress. This, we submit, was an erroneous

[7] Contrary to any implication by the taxpayer (Pet. 3), lack of knowledge that an involuntary liquidation during the fiscal year ended June 30, 1946, had caused a decrease in its inventory of flour on hand could not possibly have been "a consequence" of its accountant's erroneous instructions regarding evaluation of yearly *increases* in inventory on hand.

assumption due to the fact that the extension provisions of those Regulations were completely overlooked. Thus, as previously indicated, while those Regulations generally required a taxpayer electing to apply the involuntary relief provisions to exercise his election within six months after the time for filing his income tax return for the year of liquidation, they also specifically provided for extensions of time to make the election where such extensions were sought more than six months after the year of liquidation and circumstances justifying the election at that time were shown. The Regulations, therefore, clearly were drawn to apply retroactively to cover the type of hardship case contemplated by Congress. Those Regulations represent a valid interpretation of the statutory provisions and no important, general question of rule-making power is presented.

3. The holding that the taxpayer is not entitled to recover in this suit is correct for another reason, advanced but not passed upon, in the court below. Section 732 (a) of the Internal Revenue Code of 1939, Appendix, *infra*, pp. 18–19, provides that if the Commissioner duly issues notice of disallowance of a claim for refund relating to the application of Code Sections 711, 721 or 722, concerning abnormalities, and the taxpayer files a timely petition for redetermination in the Tax Court, the notice of disallowance shall be deemed a notice of deficiency for all purposes relating to the assessment and collection of taxes or the re-

fund or credit of overpayments.[8] Section 322 (c) of the Internal Revenue Code of 1939, Appendix, *infra,* pp. 16–17, provides that, where the Commissioner has duly issued a notice of deficiency and the taxpayer files a timely petition for redetermination in the Tax Court, no suit by the taxpayer for the recovery of any part of the tax for the period in issue shall be instituted in any court except under specified circumstances none of which are relevant here. See *Elbert* v. *Johnson,* 164 F. 2d 421, 424 (C. A. 2d); *Moir* v. *United States,* 149 F. 2d 455 (C. A. 1st); *Ross* v. *United States,* 75 F. Supp. 725 (C. Cls). In the instant case, the Commissioner duly issued notice of his disallowance of the taxpayer's claims for refund under Sections 711 and 721 (Appendix, *infra,* pp. 17–18) for the fiscal year ended June 30, 1946, and the taxpayer filed a timely petition for redetermination in the Tax Court. Accordingly, the decision of the court below that the taxpayer is not entitled to recover is correct for the additional reason that the taxpayer, having previously resorted to the Tax Court, is precluded by statute

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[8] It is now well settled that on the filing of such a petition the Tax Court has jurisdiction to consider so-called standard issues, as well as issues relating to abnormalities, for the period in issue. *H. Fendrich, Inc.* v. *Commissioner,* 192 F. 2d 916 (C. A. 7th); *City Machine & Tool Co.* v. *Commissioner,* 194 F. 2d 535 (C. A. 6th); *Packer Pub. Co.* v. *Commissioner,* 211 F. 2d 612 (C. A. 8th); *Commissioner* v. *Pittsburgh & Weirton B. Co.,* 219 F. 2d 259 (C. A. 4th).

from maintaining this suit for a refund for the same year.

CONCLUSION

The decision below is correct. There is no conflict in decisions, and further review is not warranted. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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ELLIS N. SLACK,
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JULY 1955.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

* * * * *

(c) *Inventories.*—Whenever in the opinion of the Commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner, with the approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income.

(d) [as amended by Sec. 219 (a) of the Revenue Act of 1939, c. 247, 53 Stat. 862] * * *

* * * * *

(5) If a taxpayer, having complied with paragraph (2), uses the method described in paragraph (1) for any taxable year, then such method shall be used in all subsequent taxable years unless—

(A) With the approval of the Commissioner a change to a different method is authorized; or

(B) [as amended by Sec. 118 (b) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. The Commissioner determines that the taxpayer has used for any such subsequent taxable year some procedure other than that specified in subparagraph (B) of paragraph (1) in inventorying the goods

specified in the application to ascertain the income, profit, or loss of such subsequent taxable year for the purpose of a report or statement covering such taxable year (i) to shareholders, partners, or other proprietors, or beneficiaries, or (ii) for credit purposes; and requires a change to a method different from that prescribed in paragraph (1) beginning with such subsequent taxable year or any taxable year thereafter.

In either of the above cases, the change to, and the use of, the different method shall be in accordance with such regulations as the Commissioner, with the approval of the Secretary, may prescribe as necessary in order that the use of such method may clearly reflect income.

(6) [as added by Sec. 119 of the Revenue Act of 1942, *supra*] *Involuntary liquidation and replacement of inventory.*—

(A) [as amended by Sec. 110 (a) (2) of the Revenue Act of 1943, c. 63, 58 Stat. 21; the Act of September 5, 1950, c. 851, 64 Stat. 592, and the Act of January 11, 1951, c. 1227, 64 Stat. 1244] *Adjustment of Net Income and Resulting Tax.—Years Beginning Prior to January 1, 1948.*—If, for any taxable year beginning after December 31, 1940, and prior to January 1, 1953, the closing inventory of a taxpayer inventorying goods under the method provided in this subsection reflects a decrease from the opening inventory of such goods for such year, and if the taxpayer elects, at such time and in such manner and subject to such regulations as the Commissioner with the approval of the Secretary may prescribe, to have the provisions of this paragraph apply, and if it established to the satisfaction of the Commissioner, in

accordance with such regulations, that such decrease is attributable to the involuntary liquidation of such inventory as defined in subparagraph (B), and if the closing inventory of a subsequent taxable year, ending prior to January 1, 1951, reflects a replacement, in whole or in part, of the goods so previously liquidated, the net income of the taxpayer otherwise determined for the year of such involuntary liquidation shall be adjusted as follows:

(i) Increased by an amount equal to the excess, if any, of the aggregate cost of such goods reflected in the opening inventory of the year of involuntary liquidation over the aggregate replacement cost; or

(ii) Decreased by an amount equal to the excess, if any, of the aggregate replacement cost of such goods over the aggregate cost thereof reflected in the opening inventory of the year of the involuntary liquidation.

The taxes imposed by this chapter and by chapter 2 for the year of such liquidation, for preceding taxable years, and for all taxable years intervening between the year of liquidation and the year of replacement shall be redetermined, giving effect to such adjustments. Any increase in such taxes resulting from such adjustments shall be assessed and collected as a deficiency but without interest, and any overpayment so resulting shall be credited or refunded to the taxpayer without interest.

(26 U. S. C. 1952, ed., Sec. 22.)

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(c) *Effect of Petition to Board.*—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a)

and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

* * * * *

(26 U. S. C. 1952 ed., Sec. 322.)

SEC. 711 [as added by Sec. 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974]. EXCESS PROFITS NET INCOME.

(a) *Taxable Years Beginning After December 31, 1939.*—The excess profits net income for any taxable year beginning after December 31, 1939, shall be the normal-tax net income, as defined in section 13 (a) (2), for such year except that the following adjustments shall be made:

* * * * *

(26 U. S. C. 1952 ed., Sec. 711.)

SEC. 721 [as added by Sec. 201 of the

Second Revenue Act of 1940, *supra*]. ABNORMALITIES IN INCOME IN TAXABLE PERIOD.

* * * * *

(a) [as amended by Sec. 5 of the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17] *Definitions.*—For the purposes of this section—

(1) *Abnormal income.*—The term "abnormal income" means income of any class includible in the gross income of the taxpayer for any taxable year under this subchapter if it is abnormal for the taxpayer to derive income of such class, or, if the taxpayer normally derives income of such class but the amount of such income of such class includible in the gross income of the taxable year is in excess of 125 per centum of the average amount of the gross income of the same class for the four previous taxable years, or, if the taxpayer was not in existence for four previous taxable years, the taxable years during which the taxpayer was in existence.

* * * * *

(26 U. S. C. 1952 ed., Sec. 721.)

SEC. 729 [as added by Sec. 201 of the Second Revenue Act of 1940, *supra*]. LAWS APPLICABLE.

(a) *General Rule.*—All provisions of law (including penalties) applicable in respect of the taxes imposed by Chapter 1, shall, insofar as not inconsistent with this subchapter, be applicable in respect of the tax imposed by this subchapter.

* * * * *

(26 U. S. C. 1952 ed., Sec. 729.)

SEC. 732 [as added by Sec. 9 of the Excess Profits Tax Amendments of 1941, *supra*,

and amended by Sec. 203 (a) of the Act of December 29, 1945, c. 652, 59 Stat. 669].

REVIEW OF ABNORMALITIES BY THE TAX COURT OF THE UNITED STATES.

(a) *Petition to the Tax Court.*—If a claim for refund of tax under this subchapter for any taxable year is disallowed in whole or in part by the Commissioner, and the disallowance relates to the application of section 711 (b) (1) (H), (I), (J), or (K), section 721, or section 722, relating to abnormalities, the Commissioner shall send notice of such disallowance to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the tax under this subchapter. If such petition is so filed, such notice of disallowance shall be deemed to be a notice of deficiency for all purposes relating to the assessment and collection of taxes or the refund or credit of overpayments.

* * * * *

(26 U. S. C. 1952 ed., Sec. 732.)

SEC. 1140. DATE WHEN TAX COURT DECISION BECOMES FINAL.

The decision of the Tax Court shall become final—

(a) *Petition for Review Not Filed on Time.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 1140.)

SEC. 1142. PETITION FOR REVIEW.

The decision of the Tax Court rendered after February 26, 1926 (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318 of the Revenue Act of 1926, 44 Stat. 65, 83, relating to hearings before the Tax Court prior to February 26, 1926) may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, or, in the case of a decision rendered on or before June 6, 1932, within six months after the decision is rendered. (26 U. S. C. 1952 ed., Sec. 1142.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.22 (d)–1. *Inventories Under Elective Method.*—Any taxpayer permitted or required to take inventories pursuant to the provisions of section 22 (c), and pursuant to the provisions of sections 29.22 (c)–1 to 29.22 (c)–8, inclusive, may elect with respect to those goods specified in his application and properly subject to inventory to compute his opening and closing inventories in accordance with the method provided by section 22 (d). * * *

* * * * *

SEC. 29.22 (d)–5. *Revocation of Election.*—An election made to adopt and use the elective inventory method is irrevocable, and the method once adopted shall be used in all subsequent taxable years, unless the use of another method be required by the Commissioner, or authorized by him

pursuant to a written application therefor filed with him as provided in section 29.41–2.

SEC. 29.22 (d)–7 [as amended by T. D. 5841, 1951–1 Cum. Bull. 11]. *Involuntary Liquidation and Replacement.*—If prevailing war conditions beyond the control of the taxpayer should render it impossible during the period of the war for a taxpayer using the elective inventory method to have on hand at the close of the taxable year a stock of merchandise in kind and description like that included in the opening inventory for the year, or in a quantity equal to that of the opening inventory, the resulting inventory decrease for the year will be regarded, at the election of the taxpayer, as reflecting an involuntary liquidation subject to replacement. If the taxpayer notifies the Commissioner at any time not later than 6 months after the time of filing his income tax return for the year of the liquidation that he intends to effect a replacement of the liquidated stock, in whole or in part, and that he desires to have applied in his case the involuntary liquidation and replacement provisions of section 22 (d) (6), and if he establishes to the satisfaction of the Commissioner the involuntary character of the liquidation to which his stock has been subjected, effect shall be given, when replacement has been made, to an adjustment of net income for the year of liquidation to the extent of the difference between the replacement costs incurred and the original inventory cost of the base stock inventory liquidated. (For extensions of time, see subpart H, * * *.) If the replacement costs exceed such inventory costs, the net income of the taxpayer otherwise computed shall be reduced by an amount equal to such excess.

If the replacement costs are less than the inventory costs, net income otherwise computed shall be increased to the extent of such difference. Any deficiency in the income or excess profits tax of the taxpayer, or any overpayment of such taxes, attributable to such adjustment shall be assessed and collected by the Commissioner or credited or refunded to the taxpayer without interest.

* * * * *

If the taxpayer would have the involuntary liquidation and replacement provisions applicable with respect to any inventory decreases suffered during war years, he must so elect not later than 6 months after the time of filing his income tax return for the year reflecting the decrease. In making such election, the taxpayer shall attach to his return and make a part thereof, or he shall furnish separately to the Commissioner, a statement setting forth the following matters: (1) the wish of the taxpayer to invoke the involuntary liquidation and replacement provisions; (2) a detailed list or other identifying description of the items of merchandise claimed to have been subjected to involuntary liquidation and the extent to which replacement is intended; (3) the circumstances relied upon as rendering the taxpayer unable to maintain throughout the taxable year a normal inventory of the items involved; (4) detailed proof of such circumstances to the extent that they may not be the subject-matter of common knowledge; (5) a full description of what efforts were made on the part of the taxpayer to effect replacement during the taxable year and the result of such efforts, and (6) in the case of an election

made pursuant to an extension of time sought under subpart H more than 6 months after the filing of the return for the year of liquidation, the circumstances relied upon as justifying the election at such time, together with a disclosure of the extent, if any, to which replacements have already been made.

* * * * *

SUBPART H [as added by T. D. 5391, 1944 Cum. Bull. 474–475, and amended by T. D. 5400, 1944 Cum. Bull. 476]. MISCELLANEOUS PROVISIONS.

Extension of Time for Making Certain Elections.—If in these regulations a time is fixed on or before which an election or an application for relief may be made by the taxpayer and such time is not expressly provided in the law, the Commissioner in his discretion may, for good cause shown, except as provided in the next paragraph, grant a reasonable extension of time for the making of such election or application if request for such extension is filed with the Commissioner prior to the time fixed for making such election or application or within such time thereafter as the Commissioner may consider reasonable under the circumstances and it is shown to the satisfaction of the Commissioner that the granting of the extension will not jeopardize the interests of the Government.

The time fixed in these regulations will not be extended by the Commissioner in such cases as the following: (a) an election required to be made in or with the taxpayer's original income tax return; (b) an election required to be exercised by the filing of a claim for credit or refund unless such election is required to be exercised at

a time fixed by these regulations, which time is before the date of the expiration of the period of limitations provided in section 322, or an election required to be filed in a petition to The Tax Court; (c) an application for permission to change a previous election; or (d) an application for permission to change an accounting method as described in sections 29.41–2 and 29.123–1, an application for permission to change an accounting period as described in section 29.46–1, or an application for permission to change the method of treating bad debts as described in section 29.23(k)–1.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 171

HURON MILLING COMPANY,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR HURON MILLING COMPANY, PETITIONER

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THE COURT PRESS, 130 Cedar Street, N. Y. C.

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HURON MILLING COMPANY,

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v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR HURON MILLING COMPANY, PETITIONER

This brief is submitted pursuant to Rule 24 of the Rules of this Court in reply to the brief for the United States filed in opposition to petitioner's application for a writ of certiorari.

Question Presented

May the Commissioner of Internal Revenue by regulation defeat the specific Congressional intent to

make a statute retroactive? The Act of September 5, 1950, Chapter 851, 64 Stat. 592 is made retroactive and applicable to all years ending after December 31, 1940, but the Commissioner of Internal Revenue, in promulgating his regulations thereunder, refused to permit elections to be made more than six months after the due dates of returns for the year 1941 and following years.

Statement

This reply brief is necessitated by two points raised by respondent in its brief.

1. The first is the applicability of Subpart H of Regulations 111 to petitioner's right of election under Section 22(d)(6) of the Internal Revenue Code of 1939.

2. The second involves the jurisdiction of the Court of Claims to have heard this case.

ARGUMENT

1. The Commissioner of Internal Revenue, by failing to grant retroactive application in his regulation, nullified the express intent of Congress.

Petitioner has previously pointed out in its application for a writ of certiorari that the Commissioner of Internal Revenue by regulation refused to allow petitioner a retroactive election to claim an involuntary liquidation of inventory. Congress provided for such

retroactive election by amending Section 22(d)(6) of the Internal Revenue Code of 1939 in 1950 effective as to all years ending after December 31, 1940 (R. 2a).

a) The Regulation here in question

Respondent, in its brief at page 7, argues that the reference to Subpart H contained in Section 29.22(d)-7 of Regulations 111, as amended by T. D. 5841, 1951-1 C. B. 11, prevents the Regulations from being arbitrarily applied.

Section 29.22(d)-7 of Regulations 111, as amended, permits the Commissioner to grant a taxpayer an extension of the time in the following language:

> ". . . In making such election, the taxpayer shall . . . furnish separately to the Commissioner a statement setting forth the following matters: . . . and (6) in the case of an election made pursuant to an extension of time sought under Subpart H more than six months after the filing of the return for the year of liquidation, the circumstances relied upon as justifying the election at such time, together with a disclosure of the extent, if any, to which replacements have already been made."

Subpart H provides in part as follows:[1]

> ". . . the Commissioner in his discretion may, for good cause shown, . . . grant a reasonable extension of time for the making of such election or application if request for such extension is filed with the Commissioner prior to the time

[1] Subpart H is printed in full in the Appendix at page 9.

fixed for making such election or application or within *such time thereafter* as the Commissioner may consider reasonable under the circumstances . . .". (Emphasis supplied.)

As the minority opinion below pointed out, when Congress passed the remedial section in 1950, the time to make an election in this case had long since expired with respect to the years 1941, 1942, 1943, 1944, 1945, 1946, 1947 and 1948, and part of 1949 (R. 9a). The taxpayer was entitled *to a reasonable period of time* after the passage of the Act of 1950 to take advantage of the privilege therein granted. Taxpayer received no extension of time whatsoever.[2]

The Commissioner arbitrarily denied taxpayer relief through Section 29.22(d)-7 of Regulations 111 by providing that notification of the taxpayer's election to have the involuntary liquidation relief provisions apply might be made not later than six months after the time for filing its income tax return for the year of liquidation. This is an obvious impossibility. The refusal of the Commissioner to grant taxpayer the right to make an election was a nullification of the intent of Congress.

When a regulation is not consistent with a statute, the regulation should be disregarded, not the statute. *Sykes* v. *United States,* 343 U. S. 118 (1952) at page 129, (dissenting opinion of Mr. Justice Jackson). See

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[2] Prior to the 1950 amendment of the statute eliminating the requirement that the taxpayer make his election at the time he filed his income tax return for the year of liquidation, the extension provisions of Subpart H did not apply to this type of case because they are expressly made inapplicable to elections required to be made in or with the taxpayer's original income tax return.

also *Lynch* v. *Tilden Produce Co.*, 265 U. S. 315 (1924) at page 321. A statute confers authority to "make regulations to carry out the purposes of the act—not to amend it", *Miller* v. *United States*, 294 U. S. 435 (1935) at page 440. This Court said in *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599 (1930) at page 610:

> "The limits of the power to issue regulations are well settled, *International R. Co.* v. *Davidson*, 257 U. S. 506, 514. They may not extend a statute or modify its provisions."

b) The expressed intent of Congress

The Report of the Ways and Means Committee on H. R. 3278 (Public Law 756, 81st Congress), which gave the Commissioner the authority to extend the time to make an election under Section 22(d)(6), shows clearly its intent to grant relief in such situations as that confronting this petitioner. The availability of the election was not known by petitioner until the examination of its tax return by the Revenue Agent. This is the identical situation described in the Committee Report in criticism of the prior law which Congress was seeking to correct. The Report states:

> "Present law provides that, in order to have the advantage of such a tax recomputation, the taxpayer must elect to have these provisions apply 'at the time of the filing of the taxpayer's income tax return' for the year in which the inventory liquidation occurred. *However, in some cases taxpayers did not know, at the time the return was filed, that it would be to their advantage to make such an election.* For example, there are cases where, *at the time of a subsequent investigation*

of the return, Government agents have segregated into two groups or classes an inventory which the taxpayer considered as consisting of only one class of items. As a result of this segregation it is now held that a liquidation of the inventory of one class of items occurred, although there was no decrease in the number of both classes combined. It is held that, not having made a timely election, the taxpayer cannot apply the excess cost of replacing these items in a subsequent year to reduce the tax for the year in which the liquidation occurred." (Emphasis supplied.)

c) The Question presented on this application

The position taken by respondent that petitioner is not entitled to relief on the merits, is not the issue on this application for a writ of certiorari (see "Supreme Court Practice", 2nd Edition 1954, Stern & Gressman, p. 199). The only question on this application is the importance of a review by this Court of an administrative officer's power to promulgate regulations which nullify the intent of Congress.

Respondent does not deny, in its brief, that this precise issue is a continuing one under Section 1321 of the Internal Revenue Code of 1954, the successor to Section 22(d)(6) of the 1939 Code. Nor has respondent denied the existence of a substantial number of other cases now pending in lower courts involving this very issue. The question, therefore, is one of continuing importance in the proper administration of the Internal Revenue laws.

2. Respondent is in error in arguing the jurisdiction of the Court of Claims on this application

Respondent, while admitting that the Court below did not pass on the jurisdictional question raised by it (R. 8a), argues here that the Court of Claims had no jurisdiction over petitioner's present action. Respondent urges that the Court of Claims had no jurisdiction to hear this case because petitioner previously filed a petition with The Tax Court of the United States for the same taxable year for excess profits tax relief purposes under Section 721 of the Internal Revenue Code of 1939. Respondent, citing a series of cases in a footnote at page 12 of its brief, states therein that the question of The Tax Court's jurisdiction (and hence the Court of Claims' lack of jurisdiction) "is now well settled". This is not correct. The Tax Court refuses to follow those appellate decisions and still adheres to its own views.[3] This was recognized by the Court of Claims below which said in the majority opinion that the question of jurisdiction is "extremely intricate and troublesome" (R. 8a) and thus far from being "well settled". Furthermore, since the Court below declined to pass on the jurisdictional question, petitioner submits that the merits of that issue are not properly a reason for this Court to deny petitioner's application for a writ of certiorari. This Court does not decide moot issues.

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[3] *Blue Diamond Coal Co.*, T. C. Docket Nos. 26297 and 32935, *Smith Paper, Inc.*, T. C. Docket No. 35520.

See *Commissioner* v. *Smith Paper, Inc.* (1st Cir.—1955) — F. (2d) —, on intermediate appeal from unreported order of The Tax Court.

CONCLUSION

The decision below, as brought out by the dissenting opinion, permits the Commissioner's regulations to nullify the intent of Congress to grant retroactive relief. The scope of the power of the Commissioner of Internal Revenue to make such regulations is a subject warranting review by this Court.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAY O. KRAMER,
Counsel for Petitioner.

APPENDIX

SUBPART H. MISCELLANEOUS PROVISIONS

(As added by T. D. 5391, July 14, 1944, and amended by T. D. 5400, Aug. 22, 1944)

Extension of time for making certain elections.—If in these regulations a time is fixed on or before which an election or an application for relief may be made by the taxpayer and such time is not expressly provided in the law, the Commissioner in his discretion may, for good cause shown, except as provided in the next paragraph, grant a reasonable extension of time for the making of such election or application if request for such extension is filed with the Commissioner prior to the time fixed for making such election or application or within such time thereafter as the Commissioner may consider reasonable under the circumstances and it is shown to the satisfaction of the Commissioner that the granting of the extension will not jeopardize the interests of the Government.

The time fixed in these regulations will not be extended by the Commissioner in such cases as the following: (a) an election required to be made in or with the taxpayer's original income tax return; (b) an election required to be exercised by the filing of a claim for credit or refund unless such election is required to be exercised at a time fixed by these regulations, which time is before the date of the expiration of the period of limitations provided in section 322, or an election required to be filed in a petition to The Tax Court; (c) an application for permission to change a previous election; or (d) an application for permission to change an accounting method as de-

scribed in sections 29.41-2 and 29.123-1, an application for permission to change an accounting period as described in section 29.46-1, or an application for permission to change the method of treating bad debts as described in section 29.23(k)-1.

In pursuance of the Internal Revenue Code, as amended, the foregoing regulations are hereby prescribed for taxable years beginning after December 31, 1941, and regulations 103, as amended, insofar as they relate to income taxes for taxable years beginning after December 31, 1941, are hereby superseded.

ROBERT E. HANNEGAN,
Commissioner of Internal Revenue.

APPROVED: October 26, 1943
JOHN L. SULLIVAN,
Acting Secretary of the Treasury

(Filed with the Division of the Federal Register, October 28, 1943, 9:43 a.m.)